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Richard B. Lillich
Syracuse University College of Law

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ELIGIBLE CLAIMANTS UNDER LUMP SUM AGREEMENTS

RICHARD B. LILlich†

Under traditional international law, "the first essential of an international claim is a showing that the claimant is entitled to the protection of the state whose assistance is invoked."¹ Since, as stated by the Permanent Court of International Justice in the *Panevezys-Saldutiskis Railway Case*, "it is the bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection,"² generally the person with the underlying private grievance forming the basis of the claim must demonstrate that he is a national of the claimant state.³ As recently as last year the Department of State acknowledged "the long established policy of the United States Government not to espouse formally claims of persons who were not citizens of the United States when their claims arose."⁴ It added that this policy rested upon universally accepted principles of international law and, moreover, that "as far as the Department knows [it] has been regularly followed by Western countries in their postwar settlements with Communist countries."⁵

Although lump sum agreements have settled the vast bulk of postwar claims, with the exception of a short monograph by Litmans,⁶ and sections in the standard works on nationalization by Foighel⁷ and White,⁸ little attention has been paid to the effect they may be having on customary international law norms, especially on the threshold question of eligibility.⁹ The purpose of this article, based upon a survey of one-half

† Professor of Law and Director, International Legal Studies, Syracuse University College of Law. Director, Procedural Aspects of International Law Institute.

1. 5 G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 802 (1943).

2. *Case of the Panevezys-Saldutiskis Railway*, [1939] P.C.I.J., ser. A/B, No. 76, at 16. *But see* Advisory Opinion on Reparation for Inquiries, [1949] I.C.J. 181. Compare text at and accompanying note 3 *infra*.

3. *See* 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1233-68 (1967). Occasionally nonnationals may claim a state's protection. *See id.* at 22-30.

4. *Contemporary Practice of the United States Relating to Contemporary [sic] Law*, 61 AM. J. INT'L L. 101, 105 (1967).

5. *Id.* The Department has admitted but one exception to this policy. 8 M. WHITEMAN, *supra* note 3, at 1238.

6. M. LITMAN, *THE INTERNATIONAL LUMP-SUM SETTLEMENTS OF THE UNITED STATES* (1962).

7. *See* I. FOIGHEL, *NATIONALIZATION AND COMPENSATION* 229-46 (1964) [hereinafter cited as FOIGHEL].

8. *See* G. WHITE, *NATIONALISATION OF FOREIGN PROPERTY* 51-70 (1961) [hereinafter cited as WHITE].

9. The attempts by the Harvard Law School's drafters and the International Law Commission's Special Rapporteur to reformulate the law of state responsibility

the ninety-odd lump sum settlements concluded since World War II, is to examine the major eligibility provisions in these agreements and compare whatever trends may appear with the traditional international law rules.¹⁰ Since in many instances a bare textual analysis of an agreement's article on eligibility might produce a distorted picture of the persons allowed to claim under it, whenever possible this article encompasses data obtained from earlier studies of the practice of American¹¹ and British¹² national claims commissions, which have construed numerous such provisions in the course of distributing funds to their respective nationals, plus information derived from a study of French postwar practice now in progress.¹³

I. ELIGIBILITY OF INDIVIDUALS

Most lump sum settlements specifically state that the distribution of the fund falls exclusively within the jurisdiction of the claimant country,¹⁴ but that discretion generally is limited by eligibility provisions contained in the agreement itself.¹⁵ These provisions vary considerably in detail. At one extreme, such as the agreement between Norway and Poland, they actually set forth the individual claims to be allowed.¹⁶ At the other extreme, an example being the recent settlement

both ignore the effect of such arguments. See Lillich, *Toward the Formulation of an Acceptable Body of Law Concerning State Responsibility*, 16 SYRACUSE L. REV. 721, 735-36 (1965). The final version of the American Law Institute's Restatement, however, does give them considerable weight, especially on the eligibility question. See RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 171, Reporters' Note 2, at 519 (1965), and RESTATEMENT, FOREIGN RELATIONS LAW OF THE UNITED STATES § 172, Reporters' Note 2, at 524 (1965). See also H. BRIGGS, *LA PROTECTION DIPLOMATIQUE DES INDIVIDUS EN DROIT INTERNATIONAL: LA NATIONALITÉ DES RÉCLAMATIONS* 76-98 (Institut de Droit International 1963), which cites them extensively.

10. A mimeographed list of these agreements through December 1, 1967 is available from the writer. Eventually they will be published in English in a treatise by LILlich & WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* (1970). For a preliminary article bearing the same title as the proposed treatise see *INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE* 143 (P. Sanders ed. 1967).

11. R. LILlich & G. CHRISTENSON, *INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION* ch. I (1962). See also R. LILlich, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* ch. III (1962).

12. R. LILlich, *INTERNATIONAL CLAIMS: POSTWAR BRITISH PRACTICE* ch. II (1967). This chapter originally appeared in shortened form as *The Jurisprudence of the Foreign Compensation Commission: Eligible Claimants*, 13 INT'L & COMP. L.Q. 899 (1964). See generally F. VALLAT, *INTERNATIONAL LAW AND THE PRACTITIONER* chs. II-III (1966).

13. Weston, *Postwar French Foreign Claims Practice: Adjudication by National Commissions—An Introductory Note*, 43 IND. L.J. 832 (1968).

14. See, e.g., Article 7 of the Agreement Between France and Czechoslovakia, June 2, 1950, Decree No. 51-1286 of Nov. 7, 1951, [1951] J.O. 11188.

15. See, e.g., Article 2 of the Agreement with Yugoslavia, July 19, 1948, 62 Stat. 2658, T.I.A.S. No. 1803. Cf. FOIGHEL 265.

16. Schedule A of the Agreement Between Poland and Norway, Dec. 23, 1955, [1955] Stortingets prp. No. 103.

between the Netherlands and Indonesia, they provide only that the claims of "nationals" are to be compensated, giving the claimant country wide latitude in determining just what persons are eligible.¹⁷ A majority of the agreements, however, take a middle-of-the-road approach, falling under one of several different categories.

Initially, all the agreements, like the French-Polish settlement which provides for the compensation of "individuals of French nationality,"¹⁸ reiterate the traditional rule that only nationals of the claimant country are entitled to share in the distribution of the lump sum.¹⁹ They differ considerably, however, with respect to the requirement of continuous nationality, a rule of customary international law stipulating "that a claim be continuously owned from the date the claim arose, and at least to the date of presentation, by nationals of the state asserting the claim."²⁰ A few agreements, the one between the United States and Yugoslavia being a convenient example, apparently dispense with the continuity principle, requiring only nationality "at the time of the nationalization or other taking. . . ."²¹ An occasional agreement makes nationality mandatory only "at the date of signature of the present Agreement. . . ."²² a liberalization that permits the allowance of the claims of so-called "late nationals."²³ Only a half-dozen settlements, such as the recent Canadian-Bulgarian agreement, spell out the continuous nationality rule in its

17. Articles (1), (6) of the Agreement Between the Netherlands and Indonesia, Sept. 7, 1966, [1966] *Tractatenblad van het Koninkrijk der Nederlanden* No. 199.

18. Article 4(a) of the Agreement Between France and Poland, March 19, 1948, Decree No. 51-1288 of Nov. 7, 1951, [1951] *J.O.* 11190.

19. *Cf.* FOIGHEL 231 n. 16. An interesting clause in the Greek-Yugoslav agreement excludes from its eligibility provisions "claims of nationals of one of the Contracting Parties who are domiciled outside its territory. . . ." Article 1(2)(a) of the Agreement Between Greece and Yugoslavia, June 18, 1959, 368 U.N.T.S. 9. Thus, contrary to most lump sum settlements, domicile as well as nationality is made a condition of recovery under this agreement. *Compare* WHITE 56: "The possession of the nationality of the claimant State at the material time was the only condition laid down by the compensation agreements. In none of them was the State of residence of the alien claimant referred to."

20. 8 M. WHITEMAN, *supra* note 3, at 1241.

21. Article 3 of the Agreement with Yugoslavia, note 15 *supra*. The word "apparently" deserves emphasis in view of the fact that the Foreign Claims Settlement Commission read this agreement to require continuous nationality "from the date the claim arose to the date the agreement was signed." FOREIGN CLAIMS SETTLEMENT COMMISSION, SETTLEMENT OF CLAIMS BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES AND ITS PREDECESSORS 58 (1955). *Compare* Article 3 of the Agreement Between France and Hungary, June 12, 1950, Decree No. 52-1079 of Sept. 23, 1952, [1952] *J.O.* 9260, discussed by Weston, *supra* note 13, at 849.

22. *See, e.g.,* Article 2 of the Agreement Between Sweden and Yugoslavia, Jan. 17, 1963, [1963] *Sveriges Overenskommelser Med Frammande Makter* No. 6. *See also* Article 2 of the Agreement Between Belgium and Czechoslovakia, Sept. 30, 1952, [1966] *Moniteur Belge* 9296, mentioned in 8 M. WHITEMAN, *supra* note 3, at 1238.

23. *See generally* R. LILICH, *supra* note 12, at 29-30.

traditional form.²⁴

The great bulk of the agreements, while not restating the rule, approximate it by requiring that the claimant have been a national on the date the international wrong took place *and* on the date of signature of the agreement²⁵ or the date of its entry into force.²⁶ Requiring continuity of nationality right through to the effective date of the settlement, in the words of Foighel, "appears somewhat inappropriate. It can very easily happen that alterations in ownership, due to change of nationality or inheritance, can take place after signing."²⁷ In view of the length of time between the accrual of claims and the negotiation of agreements settling them, it is reasonable to expect that a number of individual claimants will die during the additional period between the signing of an agreement and its effective date.²⁸ To the extent that their claims are disallowed because they pass to nonnational heirs or legatees, this stretching of the continuity of nationality rule appears not only unnecessary but also unreasonably harsh.

When, as in the vast majority of agreements, the gist of the continuous nationality rule is separated somewhat artificially into two independent requirements, namely, nationality on the date of loss and nationality on the date the agreement is signed, an amelioratory construction appears possible which would avoid some of the problems occasioned by the loss of nationality after a claim's accrual. While in most situations the individual who originally suffered the loss has owned the claim continuously thereafter, it is apparent that "he who applies for compensation and he who suffered the loss need not be identical; the claimant may be the successor in title of the expropriated owner."²⁹ In the latter case the two-pronged test would require nationality of both the original

24. "For the purpose of the present agreement, claims of Canada [*sic*] citizens and of Canadian juridical persons refer to claims which were owned by Canadian citizens or by Canadian juridical persons on the effective date of nationalization, expropriation or other similar measure *and continuously thereafter until the date of the present agreement.*" Article III of the Agreement Between Canada and Bulgaria, June 30, 1966, 18 EXTERNAL AFFAIRS 340 (1966) (emphasis added). Agreements concluded by the United States now take this form. *See, e.g.*, Article II(2) of the Agreement with Bulgaria, July 2, 1963, [1963] 14 U.S.T. 969, T.I.A.S. No. 5387. *See* Lillich, *The United States-Bulgarian Claims Agreement of 1963*, 58 Am. J. Int'l L. 686, 698-700 (1964).

25. *See, e.g.*, Article 2 of the Agreement Between the Netherlands and Yugoslavia, July 22, 1958, [1958] Tractatenblad van het Koninkrijk der Nederlanden No. 136, 386 U.N.T.S. 263.

26. *See, e.g.*, Article 3 of the Agreement Between Denmark and Czechoslovakia, Dec. 23, 1958, [1960] Lovtidende C 308.

27. FOIGHEL 246.

28. *See* Agreement Between the Netherlands and Yugoslavia, note 25 *supra*, where the period was thirteen months.

29. Martin, *The Distribution of Funds Under the Foreign Compensation Act*, 1950, in 44 TRANSACT. GROU. SOC'Y 243, 257-58 (1959).

owner and the eventual claimant, thus achieving the same result as the continuity of nationality rule. Where more than two individuals figure in the chain of title, however, this approach might permit some awards which the continuity rule would bar.

Suppose, for example, that a British national whose property in Poland was nationalized in 1946, had died intestate in 1950 leaving the property to American heirs.³⁰ If the heirs had made a bona fide assignment of their rights to a British national before November 11, 1954, the date the two countries concluded a lump sum settlement,³¹ the assignee would have been able to satisfy the agreement's two-pronged eligibility requirement as restated in Great Britain's implementing legislation,³² although quite clearly the claim would have failed had the continuity rule been applicable.³³ The result clearly constitutes a desirable departure from the traditional continuity of nationality rule followed in past British³⁴ and present American³⁵ practice, yet it does not get to the heart of the problem: the continued validity of the rule itself. Requiring nationality only at the time of loss seems a far more preferable approach than the two-pronged test since it retains the *raison d'être* of the nationality principle while eliminating a second, arbitrary cut-off date, thus permitting claims in which a country has a valid interest initially, while pre-

30. The presumption that no attorney would be so inept as to draft a will leaving the claim to non-British legatees unfortunately is rebuttable. Cf. FOREIGN CLAIMS SETTLEMENT COMMISSION, SIXTEENTH SEMI-ANNUAL REP. 26-29 (1962).

31. Agreement Between Great Britain and Poland, Nov. 11, 1954, [1954] Gr. Brit. T.S. No. 77 (CMD. 9343), 204 U.N.T.S. 137.

32. Sections 7(b) and 11(b) of the Polish Nationalization Order, [1956] 1 Stat. Instr. 1045-46 (No. 618). "Article 11(b) of the Polish Nationalization Claims Order does not call for continuous United Kingdom ownership and its requirements are fully satisfied so long as upon the relevant date the property was British owned." Application of Karl Leopold Oswald Perry (BP 481, 1960).

33. See Hurst, *Nationality of Claims*, 7 BRIT. Y.B. INT'L L. 162, 182 (1926). See also FOREIGN CLAIMS SETTLEMENT COMMISSION, TENTH SEMI-ANNUAL REP. 16-17 (1959), where the Foreign Claims Settlement Commission, adopting the continuous nationality rule, explained that "if at any time subsequent to the time of the loss, a claim originally accruing to a United States national had become vested in a non-national (whether by inheritance, purchase, or otherwise), the claim would not be espoused even if it was thereafter reacquired by a United States national." See text at and accompanying note 35 *infra*.

34. See Rule II of the General Instructions for His Majesty's Foreign Service, quoted in Sinclair, *Nationality of Claims: British Practice*, 27 BRIT. Y.B. INT'L L. 125, 141 (1950).

35. See text accompanying note 33 *supra*. See also FOREIGN CLAIMS SETTLEMENT COMMISSION, *supra* note 21, at 46-48, where the Foreign Claims Settlement Commission, citing a British case similar to the example given in the text at note 30 *supra*, denied a claim which had not been "owned by American nationals from the date the claim arose to the date the Agreement was signed." *Id.* at 48. Although the claimant's husband had been a United States national on the date his property was taken, a break in the continuity of American ownership of the claim occurred when he died on April 21, 1948, approximately three months before the United States signed an agreement with Yugoslavia, and eight months before the claimant's naturalization.

cluding fortunate claimants against what is often a fairly fixed sum from receiving an increased amount attributable to the deaths of other claimants before the date of settlement.³⁶ Ideally, lump sum settlements should be negotiated along such lines, as they have been occasionally in the past.³⁷ However, an equitable application of the two-pronged test at least may mitigate the harshness of the strict continuity rule in an appropriate situation.

One final problem not provided for in the settlement agreements concerns the status of dual nationals. Traditional international law maintains that "where the person injured is a dual national, the state of the one nationality is not entitled to espouse the claim against the state of the other nationality."³⁸ Since the agreements are silent on the subject, one must look to the decisions of the various national claims commissions who have construed them to see whether the claims of dual nationals are allowed. Neither in Great Britain nor in the United States has dual nationality been considered a reason for denying awards, lending support to the view that the traditional rule may "gradually fall into disuse."³⁹ Should this event occur, lump sum settlements will have contributed to the demise of a long-standing rule of customary international law.

II. ELIGIBILITY OF PARTNERSHIPS

With the trend toward the corporate form of doing business abroad, partnership claims occur less frequently in international law than they did in years past. Traditionally international law permitted such claims when the members of the partnership were all nationals of the claimant country.⁴⁰ If one of the partners was the national of another state, however, then the partnership itself was not eligible, but the remaining partners were protected individually to the extent of their interest in the firm. Thus, as has been stated elsewhere, "both partners and partnerships are eligible claimants if they meet the nationality requirements."⁴¹

Although one lump sum settlement negotiated by the United States

36. This point has been developed elsewhere. See R. LILICH, *supra* note 12, at 27-29.

37. See text at and accompanying note 21 *supra*.

38. J. SIMPSON & H. FOX, *INTERNATIONAL ARBITRATION* 106 (1959). See also Hurst, *supra* note 33, at 182, and Sinclair, *supra* note 34, at 131,141.

39. Rode, *Dual Nationals and the Doctrine of Dominant Nationality*, 53 AM. J. INT'L L. 139, 143 (1959). "The practical result in this country might be that in the future the Government of the United States will afford protection to its citizens and espouse their personal injury or property damage claims against foreign governments, notwithstanding the fact that the claimants also appear to be citizens of the respondent country."

40. Cf. J. JONES, *BRITISH NATIONALITY LAW AND PRACTICE* 299 n. 1 (1947).

41. R. LILICH & G. CHRISTENSON, *supra* note 11, at 15.

mentions claims by "a partnership or an unincorporated association,"⁴² and the British agreements generally provide for the claims of "firms and associations . . . constituted under the laws" of Great Britain,⁴³ only a relatively few settlement agreements speak in terms of claims by "firms or associations,"⁴⁴ "bodies,"⁴⁵ or "trading undertakings . . .,"⁴⁶ while the rest are silent. Presumably this silence means that partnership claims are handled by allowing the proportionate claims of individual partners rather than a single claim in the partnership's name. Confirmation of this presumption must await an examination of the distributive process in those countries which have adjudicated claims following lump sum settlements silent on the problem.

In Great Britain, one country whose agreements specifically speak of claims by "firms and associations," customary international law has been ignored and the claims of partnerships have been permitted despite the presence of nonnational partners.⁴⁷ This approach, equating partnerships to corporations and refusing to "pierce the veil," is contrary to past British practice which has held that "a firm is not an entity in English law, and that intervention and protection can only extend to individual British interests in a firm, not to the firm itself."⁴⁸ Here, the traditional approach appears far superior to the one developed under Great Britain's recent lump sum settlements, since predicated eligibility upon the nationality of the partners rather than the place of the firm's organization prevents nonnationals from sharing in limited funds intended to compensate only British interests.

III. ELIGIBILITY OF CORPORATIONS

In contrast to partnership claims, claims by corporations, rare before the century's turn, have increased substantially in number in recent years. Initially, countries espoused claims on behalf of corporations established under their laws even where almost all the stock was owned by non-nationals.⁴⁹ This mechanical approach to corporate claims reached its

42. Article II(a) of the Agreement with Rumania, March 30, 1960, [1960] 11 U.S.T. 318, T.I.A.S. No. 4451.

43. See, e.g., Article 1(b)(ii) of the Agreement Between Great Britain and Czechoslovakia, Sept. 28 1949, [1949] Gr. Brit. T.S. No. 60 (Cmd. 7797), 86 U.N.T.S. 161.

44. See note 26 *supra*.

45. Article I of the Agreement Between France and Hungary, May 14, 1965, Decree No. 65-589 of July 15, 1965, [1965] J.O. 6308.

46. Article V of the Agreement Between Denmark and Poland, Feb. 26, 1953, [1954] Lovtidende C 1, 186 U.N.T.S. 301.

47. See generally LILLICH, *supra* note 12, at 34-36.

48. See note 40 *supra*.

49. See Crandall, *Principles of Law Applied by the Spanish Treaty Claims Commission*, 4 AM. J. INT'L L. 806, 814-51 (1910).

zenith in the prewar period with Beckett's flat assertion that "the doctrine that the nationality of a company for the purposes of International Law is, irrespective of the nationality of the shareholders, that of the country under whose law it is incorporated is the one which, it seems to me, is now really firmly established."⁵⁰ Developments during the postwar period, especially the pattern established by numerous lump sum settlements, appear to have modified, if not undercut completely, this formalistic attitude toward such claims.

All the settlement agreements studied have some provision to cover claims by corporations, whether this form of doing business is contemplated as falling under the rubric of "legal persons,"⁵¹ "juridical . . . persons,"⁵² "corporate persons,"⁵³ "corporate bodies,"⁵⁴ "companies,"⁵⁵ or the actual term "corporations."⁵⁶ Occasionally, an additional provision is included specifying that the corporation must possess the "nationality"⁵⁷ or "character"⁵⁸ of the claimant country, but that proposition apparently is so self-evident that such provisions are relatively rare. Nationality, express or implied, always is considered the *sine qua non* of eligibility, although a few agreements do contain phraseology broad enough to permit claims by nonnational corporations. The Greek-Yugoslav settlement, for example, speaks of mutual claims by "corporate bodies having their main place of establishment in their respective territories,"⁵⁹ while France's agreement with Poland mentions claims by "companies under French control. . . ."⁶⁰ It is fair to say, however, that corporations not nationals of the claimant country rarely are eligible under the postwar settlement agreements.

On the other hand, these settlements, taken as a whole, reveal a definite trend away from the prewar formalistic approach to corporate claims and toward a functional, if not always flexible, approach designed

50. Beckett, *Diplomatic Claims in Respect of Injuries to Companies*, in 17 *TRANSACT. GROT. SOC'Y* 175, 185 (1932). But see C. PARRY, *NATIONALITY AND CITIZENSHIP LAWS OF THE COMMONWEALTH* 139 (1957).

51. See note 26 *supra*.

52. See, e.g., Article 1 of the Agreement Between France and Rumania, Feb. 8, 1959, Dec. No. 59-439 of March 11, 1959, [1959] J.O. 3287.

53. See, e.g., Article 2 of the Agreement Between Turkey and Yugoslavia, July 13, 1956 (mimeographed).

54. See, e.g., Agreement Between Sweden and Yugoslavia, note 22 *supra*.

55. See, e.g., Article 4(b) of the Agreement Between France and Poland, note 18 *supra*.

56. See, e.g., Article 2 of the Agreement Between Czechoslovakia and Yugoslavia, Feb. 11, 1956, 397 U.N.T.S. 150.

57. See, e.g., Article 2 of the Agreement Between France and Yugoslavia, April 14, 1951, Decree No. 53-653 of July 24, 1953, [1953] J.O. 6723.

58. See, e.g., Article I of the Agreement Between Sweden and Japan, Sept. 20, 1957 [1958] *Sveriges Overenskommelser Med Frammande Makter* No. 14.

59. Article 1(1) of the Agreement Between Greece and Yugoslavia, note 19 *supra*.

60. Article 4(c) of the Agreement Between France and Poland, note 18 *supra*.

to protect the interests of the claimant country. Since, as Foighel rightly notes, "international law gives no direct solution in connexion with the question of the nationality of juridical persons,"⁶¹ countries may seek solutions in their own municipal law, and, indeed, even are free to impose additional requirements upon a national corporation before espousing or settling its claim. True, a few countries, the most prominent being Great Britain, still heed Beckett's call, for present "British practice regards a British company entitled to compensation irrespective of who its shareholders are."⁶² This result follows from an over-literal interpretation of British settlement agreements by the Foreign Compensation Commission.⁶³ All the settlements define the term "British nationals" to include "companies" incorporated under English law, making no reference to any required British interest therein, and the Commission consistently has allowed the claims of all companies incorporated in Great Britain without inquiry into the nationality of their stockholders. However, few other countries judge a corporation's eligibility solely on the basis of its place of incorporation. Most states, to quote Foighel again,

are abandoning the formal criteria without regard to whether this involves the scope of diplomatic protection becoming particularly wide or particularly narrow, and instead are trying to discover what, from the viewpoint of international law, must and ought to be the decisive elements, namely the actual interests which lie behind the legal constructions.⁶⁴

A discussion of several tests used by countries to weigh their interest in settling corporate claims follows.

One of the most obvious tests, the nationality of the corporation's stockholders, has been adopted by the United States in its lump sum settlements. Starting with the Yugoslav agreement, which in addition to incorporation in the United States required that twenty per cent or more of any class of the corporation's outstanding securities be owned by individual nationals of the United States,⁶⁵ the United States increased the percentage of the corporation's outstanding capital stock or other beneficial interest that must be owned by United States nationals to fifty per cent.⁶⁶ While this approach certainly precludes corporate claims where a substantial American ownership interest is not involved, the

61. FOIGHEL 232.

62. Drucker, *Compensation for Nationalized Property: The British Practice*, 49 AM. J. INT'L L. 477, 483 (1955). See generally R. LILICH, *supra* note 12, at 36-40.

63. See, e.g., Article 3(1)(ii) of the Agreement Between Great Britain and Bulgaria, Sept. 22, 1955, [1955] Gr. Brit. T.S. No. 79 (Cmd. 9625), 222 U.N.T.S. 349.

64. FOIGHEL 237.

65. Article 2(B) of the Agreement with Yugoslavia, note 15 *supra*.

66. See, e.g., Article II(b) of the Agreement with Rumania, note 42 *supra*.

wisdom of utilizing a fixed percentage instead of a flexible standard of substantial American interest has been questioned.⁶⁷ In general, however, this approach of using an arbitrary standard has met with approval: witness the favorable evaluation made by a former member of the Foreign Claims Settlement Commission upon the completion of the Yugoslav claims program:

Setting a schedule or a percentage of the total interest involved appears to be a practical standard for such intervention. Such a formula eliminates the difficult question as to what interest shall be deemed substantial. On the other hand, a flexible measure is advantageous in hardship cases and other cases of special merit. Gradually, the Department of State and the Congress have been leaning toward rigid criteria rather than a flexible yardstick. Experience has shown that this course is not without reason.⁶⁸

There is little likelihood that the United States will depart radically from the fifty per cent rule in the immediate future.⁶⁹

Another test to determine the eligibility of corporations that has been adopted by some countries takes the *siège social* of the corporation as the controlling factor. According to White,

the *siège social* of a company as that term is understood in continental systems of law is the place where the company exercises legal, financial and administrative control over its operations. In France, the courts will look at the facts to determine the true *siège* if they think that the company's articles have conferred an artificial *siège* on the company. In finding the true *siège* the courts disregard such factors as the nationality of the shareholders, the country where the company's exploitation is carried on, and the *siège administratif* if this is separate from the main center of control.⁷⁰

Agreements which embody this test have been concluded by Denmark, whose settlement with Poland covers corporations "having their *siège*

67. Rubin has pointed out that the technique of using a fixed percentage "depends necessarily on the arbitrary drawing of a line, and there is little more reason for a twenty per cent than a fifteen or a fifty per cent rule." Rubin, *Nationalization and Compensation: A Comparative Approach*, 17 U. CHI. L. REV. 458, 468 (1951).

68. Clay, *Recent Developments in the Protection of American Shareholders' Interests in Foreign Corporations*, 45 GEO. L.J. 1, 11 (1956).

69. Cf. Article II of the Agreement with Yugoslavia, Nov. 5, 1964, [1964] 16 U.S.T. 1, T.I.A.S. No. 5750.

70. WHITE 63.

social in Denmark;”⁷¹ by Greece, whose agreement with Yugoslavia settles claims of corporations “having their main place of establishment” in Greece;”⁷² and by Sweden, whose settlement with Poland permits claims by corporations “having their *siège social* in Sweden.”⁷³ Moreover, it is highly likely that other countries such as France, whose agreements go no further than providing for the claims of “French companies,”⁷⁴ use this eligibility test.⁷⁵

Even when the corporation is a national of the claimant country and has its *siège social* there, many settlement agreements impose an additional requirement before deeming it an eligible claimant. Starting with Switzerland’s agreement with Yugoslavia,⁷⁶ settlements by Belgium,⁷⁷ Italy⁷⁸ and Sweden⁷⁹ have provided that, in addition to having its *siège social* in the respective country, a claimant corporation also must show that it has, say, a preponderant Swiss interest.⁸⁰ In many instances, of course, this requirement is satisfied by an examination of the nationality of the corporation’s stockholders, but other factors often are relevant too. Bindschedler has revealed an aide-memoire to the above Swiss agreement which sets forth that country’s approach to the problem of corporate claimants:

In the majority of cases a ‘predominant Swiss interest’ will be manifest when the effective majority of the subscribers of capital are Swiss. If there is no majority, it is a matter

71. See note 46 *supra*. A subsequent settlement reverts to the test “of Danish nationality. . . .” See note 26 *supra*. “Here, therefore, importance is attached solely to formal nationality.” FOIGHEL 236.

72. Article 1(1) of the Agreement Between Greece and Yugoslavia, note 19 *supra*.

73. Article 5 of the Agreement Between Sweden and Poland, Nov. 16, 1949, [1950] Sveriges Overenskommelser Med Frammande Makter No. 52.

74. See, e.g., Article 4(b) of the Agreement Between France and Poland, note 18 *supra*. See text at note 70 *supra*.

75. But see text at note 71 *supra*. “[I]t can only be said that existing practice in national legislation is naturally reflected in the claims for compensation which have been settled.” FOIGHEL 232.

76. Article 5 of the Agreement Between Switzerland and Yugoslavia, Sept. 27, 1948, [1948] Amtl. Samml. 1007. “The later Swiss agreements, i.e. those concluded with Hungary, Roumania, and Bulgaria have discarded the test of location of the *siège* altogether in favour of the sole test of a preponderant Swiss interest.” WHITE 63 n. 38.

77. See note 22 *supra*.

78. Article 2 of the Agreement Between Italy and Yugoslavia, May 23, 1949, 150 U.N.T.S. 181.

79. Article 2 of the Agreement Between Sweden and Hungary, March 31, 1951, [1951] Sveriges Overenskommelser Med Frammande Makter No. 16. A subsequent settlement reverts to the test of “Swedish nationality. . . .” See FOIGHEL 236.

80. “Sweden regarded either of these factors as sufficient to found a claim to compensation under her agreement with Hungary. Article 2 defined Swedish assets, rights and interests as those belonging to Swedish natural persons and to juridical persons or commercial companies the headquarters of which were in Sweden or which were a predominantly Swedish interest.” WHITE 63-64. See note 79 *supra*.

of determining the minority which exercises control on the company; this is especially easy to establish when a compact minority is faced with a scattered majority. The composition of the board of management (conseil d'administration) or of the directorate may also be decisive when it falls to them to determine the policy and take the decisions of the company. Finally, in certain cases the creditors must not be ignored, for they may exercise a certain influence over the enterprise. But it is always necessary to take the actual circumstances of each case into account and not rely upon purely legal fictions.⁸¹

In this writer's opinion the final sentence of the above quotation, manifesting the strong postwar trend away from the rigid Anglo-American place-of-incorporation rule that held sway before World War II, represents the correct approach to the handling of corporate claims.

IV. ELIGIBILITY OF STOCKHOLDERS

In view of the forthcoming decision in the *Barcelona Traction Case*,⁸² now pending before the International Court of Justice, any evaluation of the standing of stockholder claims in international law must be highly tentative in character. Nevertheless, the pattern revealed by an examination of recent lump sum settlements is sufficiently definite to hazard a few predictions in this developoing area of international law. Indeed, since stockholder claims began to attain significance about the time international claims commissions began their eclipse, one really must look to these settlement agreements to determine the attitude of states toward the claims of stockholders. In order to sort out the different types of claims based upon stockholding, it is useful to review briefly the history of such claims.

Until the beginning of this century, stockholders had little protection under international law. The Department of State, for instance, first took no interest in the claims of United States stockholders in foreign corporations, but since World War I it "has shown an increasing interest in espousing the claims of American stockholders who have made foreign investments."⁸³ A 1923 decision of the Mixed Claims Commission, United States and Germany, "was apparently the first formal recognition . . . of the right of stockholders to obtain relief for war damage to their interests in foreign corporations."⁸⁴ The Special

81. Bindschedler, *Recent Decisions in Switzerland—II*, 3 INT'L & COMP. L.Q. 512, 515 (1954).

82. Case of the Barcelona Traction, Light and Power Co., Ltd., [1964] I.C.J. 131.

83. Clay, *supra* note 68, at 6.

84. *Id.* at 13.

Mexican Claims Commission, a national commission established in 1934 to distribute a lump sum settlement received from Mexico,⁸⁵ was the first such commission given jurisdiction to consider claims of United States nationals based upon damage to foreign corporations "in which citizens of the United States have or have had a substantial and bona fide interest."⁸⁶ This "substantial and bona fide interest" test was utilized a decade later by the American-Mexican Claims Commission, a national commission set up following a subsequent settlement agreement with Mexico,⁸⁷ which adjudicated numerous claims of United States stockholders in Mexican corporations.⁸⁸

The rationale for the allowance of such claims is apparent. When an individual or corporate stockholder is a United States national owning stock in an American corporation which suffers a compensable loss abroad, the latter's corporate claim precludes any possible claim on the stockholder's part.⁸⁹ However, if the corporation is an ineligible claimant, either because it was incorporated in the nationalizing country or in a third state,⁹⁰ failure to "pierce the corporate veil" would deprive the stockholder of any possibility of recovery. In such circumstances, the trend has been to disregard the corporate fiction and protect the stockholder to the extent of his proportionate interest in the injured or nationalized corporation.⁹¹ As White observes, "shareholders' rights in companies possessing the nationality of the respondent State can be protected by their own national State where the injury is of such a nature as to terminate the existence of the legal person, or to render it defunct

85. Convention with Mexico, April 24, 1934, 49 Stat. 3071, T.S. No. 878.

86. This legal standard was incorporated by reference from the Convention with Mexico, Sept. 10, 1923, 43 Stat. 1723, T.S. No. 676.

87. Convention with Mexico, Nov. 19, 1941, 56 Stat. 1347, T.S. No. 980.

88. See, e.g., American-Mexican Claims Commission, Report to the Secretary of State 623 (1948). See also Domke, "Piercing the Corporate Veil" in the Law of Economic Warfare, 1955 Wis. L. Rev. 77, 84 n. 37.

89. Cf. FOIGHÉL 238. An exception occurs when the American corporation does not meet the eligibility requirements for corporate claimants, i.e., fails to meet the fifty per cent standard. See text at note 66 *supra* and text at and accompanying note 90 *infra*.

90. It also may be ineligible because it failed to meet the fifty per cent test despite the fact it was incorporated in the United States. See text accompanying note 89 *supra*.

91. Such is the trend, at least, if the corporation was incorporated under the laws of the nationalizing country. FOIGHÉL 238-42. One authoritative work, written in 1949 and specifically excluding treaty practice, limits the right of protection to cases "where the corporation is a national of the state oppressing it. It may be that the same consideration [the lack of any effective remedy by corporate action] will permit the extension of the exception to cases where the corporation is *not* such a national, and the shareholders cannot reasonably be said to possess any effective remedy other than the intervention of their own Government. It cannot be said, however, that such an extension has, as yet, been sanctioned by international practice." Jones, *Claims on Behalf of Nationals Who are Shareholders in Foreign Companies*, 26 BRIT. Y.B. INT'L L. 225, 257-58 (1949). See text at note 92 *infra*.

for all practical purposes.”⁹² And even Friedman, hardly a staunch supporter of private property, acknowledges that in such cases “international law deliberately sacrifices the unitary conception of legal personality which regards corporations as having a single nationality in order to look beyond the legal forms and to determine the interests and the parties actually suffering injury.”⁹³

Examining the postwar lump sum settlements, one must agree with White that “nearly all of the compensation agreements covered the claims of shareholders,”⁹⁴ at least insofar as claims based upon direct stock interests in nationalized corporations of taking states were concerned. Some agreements, such as the United States-Polish settlement, describe in great detail the various classes of compensable stockholder claims.⁹⁵ Others, such as the settlement between the Netherlands and Yugoslavia, expressly state that the claims settled include “all Netherlands interests in the form of direct or indirect participation in enterprises in Yugoslavia.”⁹⁶ Finally, many agreements, notably the ones concluded by Great Britain, merely intimate that such claims may have been contemplated by defining the property for which compensation is being paid as property owned “directly or indirectly” by nationals of the claimant country.⁹⁷

Although the United States, in its agreement with Yugoslavia, rejected the “substantial and bona fide interest” test and permitted the claims of United States nationals holding stock in Yugoslav corporations regardless of the extent of American interest in a corporation,⁹⁸ not all countries have taken this approach. In an early settlement with Poland, France did provide for the payment of claims of persons “having a minority share, however small, in all other [non-French] companies,”⁹⁹

92. WHITE 69, citing Jones, *supra* note 91, at 257. Accord, WORTLEY, EXPROPRIATION IN PUBLIC INTERNATIONAL LAW 11-12 (1959). See also DRUCKER, *The Confiscation of Corporations and the Conflict of Laws*, 234 L.T. 355 (1963).

93. S. FRIEDMAN, EXPROPRIATION IN INTERNATIONAL LAW 171 (1953).

94. WHITE 69. “The post-war treaty practice has shown that the States of Eastern Europe, at any rate, did not seek to rely on the corporate façade to the detriment of foreign interests, but that they were prepared to recognise the claim of shareholders to benefit under the compensation agreements.” *Id.* at 70.

95. See Annex A of the Agreement with Poland, July 16, 1960, [1960] 11 U.S.T. 1953, T.I.A.S. No. 4545.

96. See note 25 *supra*. See also note 56 *supra*.

97. See, e.g., Article 4(1) of the Agreement Between Great Britain and Hungary, June 27, 1956, [1956] Gr. Brit. T.S. No. 30 (Cmd. 9820), 249 U.N.T.S. 19. See also notes 26 and 73 *supra*.

98. Article 2(C) of the Agreement with Yugoslavia, note 15 *supra*. A stockholder who owned but a few shares in a Yugoslav corporation thus was compensated. See Clay, *supra* note 68, at 15. This approach has been followed in subsequent agreements. See generally R. LILICH & G. CHRISTENSON, *supra* note 11, at 18-20.

99. Article 4(d) of the Agreement Between France and Poland, note 18 *supra*.

and Great Britain also has adhered to this test uniformly.¹⁰⁰ However, subsequent French agreements have allowed stockholder claims only if French claimants hold "a share of at least fifty per cent in these same companies,"¹⁰¹ while a similar provision to the effect that "Netherlands individuals or corporate bodies holding majority shares in companies incorporated under Yugoslav law . . . shall be compensated for their vested right to claim against these companies" is found in a recent Dutch-Yugoslav agreement.¹⁰² The Anglo-American approach appears to predominate, but at this stage it is still too early to speak authoritatively on this unsettled question.

One final problem deserves mention, namely, stockholder claims through corporations of a third state. The United States first allowed such "indirect claims" under the Yugoslav agreement,¹⁰³ and it continues to permit them subject to a twenty-five per cent American ownership interest requirement.¹⁰⁴ Neither Great Britain¹⁰⁵ nor, apparently, the continental countries¹⁰⁶ permit these claims, and the authorities appear to be evenly divided as to whether they should be allowed. Enough writers have taken a negative stand¹⁰⁷ to require a revision of Nial's observation that "occasionally the idea has been expressed that the right of intervention on behalf of shareholders exists only when the damage has been caused by the state of incorporation or domicile."¹⁰⁸ Calling this supposed distinction "too formalistic and therefore not convincing,"¹⁰⁹ he agrees with Wortley that "when the State of incorporation refuses to give diplomatic protection, then the shareholders

100. See R. LILICH, *supra* note 12, at 42.

101. Article 1(b) of the Additional Protocol No. 1 to the Agreement Between France and Czechoslovakia, note 14 *supra*. While Article 2 of the Agreement Between France and Yugoslavia, *supra* note 57, permits claims for "all French interests in Yugoslav enterprises," see Weston, *supra* note 13, at 856, Article 5(2)(3) seems to require a majority French interest in a Yugoslav corporation as a condition precedent to a stockholder's claim.

102. Article 5(2) of the Agreement Between the Netherlands and Yugoslavia, note 25 *supra*.

103. "For example, if an American national owned five per cent of the stock of a Swiss corporation, which in turn owned the stock of a Yugoslav corporation, the property of which was nationalized, the American national would be an eligible claimant against the fund." Rubin, *supra* note 67, at 466. But see FOIGHEL 238-39. Compare Bagge, *Intervention on the Ground of Damage Caused to Nationals, with Particular Reference to Exhaustion of Local Remedies and the Rights of Shareholders*, 34 BRIT. Y.B. INT'L L. 162, 170-75 *passim* (1958), with R. LILICH, *supra* note 12, at 44-46.

104. *Id.* at 42 n. 85.

105. *Id.* at 42-47, 49-52.

106. See FOIGHEL 238-40.

107. *Id.* See also text at and accompanying notes 91-92 *supra*.

108. Nial, *A Contribution to the Question of the Protection of Limited Companies in the Law of Nations* (Hague Academy of International Law), 101 RECUEIL DES COURS 311, 320 (1960-III).

109. *Id.* at 321.

may rightly look to their own Governments for diplomatic assistance."¹¹⁰ This writer endorses Nial's analysis, yet admits that his view finds little support in the non-American lump sum settlements under study. Perhaps the problem can be summed up succinctly by quoting Jones's plaintive notation: "Another point on which the law is uncertain is the position where the shares of the foreign corporation are held by other companies which in turn are held in whole or in part by other companies—all companies possibly of different nationalities."¹¹¹

V. CONCLUSION

It was stated at the outset of this article that little attention had been paid to the ninety-odd lump sum agreements which have settled most of the international claims that have arisen since World War II, and to the effect these settlements may be having on customary international law norms. While, in the areas of individual and partnership claims, their impact has not been startling, they appear to have rewritten the law governing corporate and stockholder claims almost *de novo*. At the very least, international lawyers, whether in private practice or foreign offices, should be familiar with these agreements. Properly appreciated, they should exert a heavy influence on state practice and hence contribute to the creation and clarification of the norms governing this developing area of customary international law.

110. WORTLEY, *supra* note 92, at 144. Indeed, Nial apparently goes beyond Wortley in urging protection when the third state "intervenes in a way that does not properly guard the interests of the company. . . ." Nial, *supra* note 108, at 321.

111. Jones, *supra* note 91, at 258 n. 1.